Nos. 5662 and 5663

In the United States Circuit Court of Appeals for the Ninth Circuit

B. J. RUCKER, PETITIONER

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE

B. J. RUCKER, PETITIONER

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT[1]

PREVIOUS OPINION

The only previous opinion in each case is that of the United States Board of Tax Appeals (Cause

[1] The facts and issues of law in both Cause No. 5662 and Cause No. 5663 being in substance the same, respondent's position is brought to the attention of the court in the one brief.

No. 5662, R. 11–17, and Cause No. 5663, R. 17–29) reported in 9 B. T. A. 921 and 9 B. T. A. 915, respectively.

JURISDICTION

The appeals in the above-entitled causes involve income tax for the calendar years 1918 and 1919 (Cause No. 5662, R. 4, 6, 7; Cause No. 5663, R. 4, 12–15), and are taken from final orders of the United States Board of Tax Appeals, entered March 20, 1928 (Cause No. 5662, R. 18–19; Cause No. 5663, R. 30). The cases are brought to this court by petitions for review, filed October 4, 1928 (Cause No. 5662, R. 20–22; Cause No. 5663, R. 31–34) pursuant to the Revenue Act of 1926 (Act of February 26, 1926, c. 27, Sections 1001, 1002, and 1003, 44 Stat. 9, 109, 110).

QUESTION PRESENTED

Did the distributive share of B. J. Rucker of the profits of the partnership of Rucker Brothers, during the years 1918 and 1919, constitute separate income, taxable in its entirety to Rucker, or did it constitute community property, taxable one-half to B. J. Rucker and one-half to his wife?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1152:

PART II.—INDIVIDUALS

NORMAL TAX

SEC. 210. That, * * * there shall be levied, collected, and paid for each taxable

year upon the net income of every individual a normal tax * * *;

* * * * *

SURTAX

SEC. 211. (a) That, * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *.

Revenue Act of 1926 (Act of February 26, 1926), c. 27, 44 Stat. 9, 109—

COMMUNITY PROPERTY

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse.

STATEMENT OF FACTS

The facts are as follows:

B. J. Rucker, the petitioner, was married in December, 1904, and he has lived continuously with his wife since that time. At the time of his marriage, Rucker owned a one-half interest in the copartnership of Rucker Brothers, the assets of

which consisted of lands and town lots and some shares of stock in the Rucker Bank. Rucker Brothers were engaged in the real-estate business at the time of Rucker's marriage, but in 1907 or 1908 the firm entered into the logging and sawmill business. The lands and town lots owned by the partnership at the time of Rucker's marriage were nonproductive properties from which there has been no income from the time of his marriage to the present time. (Cause No. 5662, R. 13–14; Cause No. 5663, R. 22.)

The profits earned by the partnership of Rucker Brothers have come from enterprises that they have been engaged in, such as timber and sawmill and logging operations, for which the firm borrowed money and started. They have bought most of their timber on the installment plan, making only a small initial payment therefor. (Cause No. 5662, R. 14; Cause No. 5663, R. 22–23.)

Rucker has kept no record of the property he had at the time he was married, nor of what he has accumulated subsequently to marriage. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

Rucker Brothers purchased a quantity of timber from the Puget Mill Company in 1917, at a total purchase price of $625,000, for which they paid $5,000 in cash, and the balance of $620,000 in promissory notes, extending over a period of several years, all of which notes were signed by W. J. and B. J. Rucker, for the partnership. A portion of that timber was later sold at a profit of upwards of

$80,000. The portion of that timber that was not sold was cut and sawed at their own mill and paid for as it was cut and removed. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

During the period 1907 to 1916 the firm of Rucker Brothers borrowed several sums of money for use in the partnership. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

All of Rucker's property at the time of his marriage was his equity in the partnership, and all of his income has been from the partnership distributions. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

Rucker Brothers filed an amended partnership return for the year 1918, showing therein $95,699.27 as the total distributive income of the partnership for that year, divided $47,849.64 and $47,849.63 for W. J. and B. J. Rucker, respectively. (Cause No. 5662, R. 15.)

Losses on the dissolution of the corporation Tulalip Company, owned entirely by the partnership, Rucker Brothers, deducted from the distributive income, left a net taxable income reported by B. J. Rucker of $36,623.32. (Cause No. 5662, R. 15.)

The respondent determined the net income of B. J. Rucker to be $47,599.90. (Cause No. 5662, R. 15.)

The Board of Tax Appeals allowed the deduction taken and the Commissioner of Internal Revenue

has acquiesced in the Board's decision. (Cause No. 5662, R. 15–17; Int. Rev. Bul. VII, 29–3801.)

B. J. Rucker filed an individual income tax return for the year 1919 on March 15, 1920, showing therein as his share of the partnership distribution $62,-741.12, and in addition, salary received from the partnership, of $9,000, making a total net income reported of $71,741.12. (Cause No. 5663, R. 23.)

Mrs. B. J. Rucker filed an individual income tax return for the year 1919, on May 5, 1921, reporting $35,870.56, being one-half of the total income reported by Rucker in his original return. On May 5, 1921, Rucker himself filed an amended individual income tax return, showing therein one-half of the total net income reported by him in his individual return, or $35,870.56. (Cause No. 5663, R. 23–24.)

The parties agreed upon the disputed additions to income and deductions taken, by written stipulation. (Cause No. 5663, R. 19–22.)

The sole question remaining for determination by the Board, in both causes, was whether the Commissioner correctly held that the entire distributive share of B. J. Rucker, in the partnership of Rucker Brothers, was separate property, or whether said share was community income, under the laws of the State of Washington. The Board upheld the Commissioner's determination.

The petitioner, in both causes, has concurred in all of the findings of fact promulgated by the Board, contending only that the Board erred in its conclu-

sions. (Cause No. 5662, R. 21; Cause No. 5663, R. 33.)

SUMMARY OF ARGUMENT

The entire distributive share of the income of B. J. Rucker, in the partnership of Rucker Brothers for the years 1918 and 1919, constituted separate income and hence is taxable to him.

ARGUMENT

The entire distributive share of the income of B. J. Rucker in the partnership of Rucker Brothers for the years 1918 and 1919 constituted separate income and hence is taxable to him

Section 1212 of the Revenue Act of 1926, *supra,* provides in part that—

> Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period.

The respective rights of husband and wife in the community property of the State of Washington are defined by the following sections of Remington's Compiled Statutes of Washington, 1922:

> SEC. 6890. Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject

to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

SEC. 6891. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

SEC. 6892. Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

Stated in summary, these statutes provide that the "property and pecuniary rights" of the husband and wife, owned by them at the time of marriage, together "with the rents, issues, and profits thereof" constitute their separate property, and the property acquired after the marriage, with certain specified exceptions, is community property.

In construing the above-quoted sections, the courts of Washington have held, and it is now the law in that State, that the wife has during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein. *Opinion of Attorney General,* March 3, 1921, T. D. 3138, 4 C. B. 238; *Holyoke* v. *Jackson,* 3 Pac. 841 (3 Wash. T. 235); *Mabie* v. *Whittaker,* 39 Pac. 172 (10 Wash. 656); *Marston* v. *Rue,* 159 Pac. 111 (92 Wash. 129); *Schramm* v. *Steele,* 166 Pac. 634 (97 Wash. 309); *Huyvaerts* v. *Roedtz,* 178 Pac. 801 (105 Wash. 657).

Washington is therefore one of the community property States, within the provisions of Section 1212 of the Revenue Act of 1926, *supra,* in which the husband and wife may each report one-half of the community income. There then remains only the question of determining whether the distributive share of B. J. Rucker of the partnership profits for 1918 and 1919 was separate property or community property.

The courts of Washington have handed down a vast number of decisions with respect to community property, from which it is possible to establish definite rules for the determination of the status, in that State, of the income under consideration. Certain of the rules pertinent to the discussion herein are contained in the decision of the Supreme Court of the State of Washington in the case of *In re*

Brown's Estate, 214 Pac. 10, 11 (124 Wash. 273). These rules are:

> 1. The presumption is that property acquired during coverture is community property * * *; and the burden is upon the person claiming it to be separate property to establish that as its character. (Citing case.)
>
> 2. The status of the property is to be determined as of the date of its acquisition. * * *. This rule is equally true with regard to personal property as with real property. (Citing case.)
>
> 3. If property is once shown to have been separate property, the presumption continues that it is separate until overcome by evidence. * * *.
>
> Separate property continues to be separate through all its changes and transitions so long as it can be clearly traced and identified. (Citing cases.)
>
> 4. The rents, issues, and profits of separate property remain separate property and profits resulting from money borrowed on separate credit are separate property. (Citing cases.)
>
> 5. Separate property may lose its identity as such by being consolidated with community property. * * *

In that case, the court found that certain items of the estate were community property, but that the increased value in the stock of the Klale Investment Company and its obligations to Brown's Estate constituted separate property, the stock having been

purchased from funds which were separate property, and the profits of the company having resulted from that original investment, together with money borrowed on the strength of Brown's separate credit.

The instant case is quite analogous. Applying the principles above set forth to the facts found by the Board, which findings have been concurred in by petitioner, it must be concluded that the income derived from the partnership distributions is to be attributed primarily to separate property.

The income in question was acquired during coverture, so that it is presumed to be community property. This presumption, however, is rebuttable. *Lemon* v. *Waterman,* 7 Pac. 899 (2 Wash. T. 485); *Weymouth* v. *Sawtelle,* 44 Pac. 109 (14 Wash. 32); *Dobbins* v. *Dexter Horton & Co.,* 113 Pac. 1088 (62 Wash. 423).

In referring to this presumption, the court, in *Weymouth* v. *Sawtelle, supra,* in no uncertain language says (14 Wash. 32, 33):

> * * * but this presumption under our law is a disputable, and not a conclusive, presumption.

In the instant case the facts are:

At the time of his marriage, Rucker owned a one-half interest in the copartnership of Rucker Brothers. (Cause No. 5662, R. 13; Cause No. 5663, R. 22.) All of Rucker's property at the time of his marriage was his equity in the partnership and all

of his income has been from the partnership distributions. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.) He also received from the partnership a salary of $9,000. (Cause No. 5663, R. 23.) The salary so received is not here under consideration.

The partnership interest of Rucker is unquestionably separate property, it having been acquired prior to his marriage. The status of property is determined and fixed at the date of its acquisition. (*Rule 2, in re Brown's Estate, supra; Katterhagen* v. *Meister,* 134 Pac. 673 (75 Wash. 112).) If property is once shown to have been separate property the presumption continues that it is separate until overcome by evidence. *Guye* v. *Guye,* 115 Pac. 731 (63 Wash. 340). Separate property continues to be separate property through all its changes and transitions, so long as it can be clearly traced and identified. *Denny* v. *Schwabacher,* 104 Pac. 137 (54 Wash. 689); *In re Deschamps' Estate,* 137 Pac. 1009 (77 Wash. 514); *Dart* v. *McDonald,* 195 Pac. 253 (114 Wash. 448); *Merrick* v. *Appenzeller,* 196 Pac. 629 (115 Wash. 181); *Rule 3, In re Brown's Estate, supra.*

Rule 4, quoted above, provides:

> The rents, issues, and profits of separate property remain separate property and profits resulting from money borrowed on separate credit are separate property.

The partnership properties held at the time of Rucker's marriage were nonproductive and played

no part in the production of the partnership's income under consideration. There is no evidence with respect to the other partnership assets as of that date.

The profits earned by the partnership of Rucker Brothers have come from enterprises they have engaged in, such as timber and saw-mill and logging operations (begun in 1907 or 1908), for which the firm borrowed money and started. They (the firm) bought most of their timber on the installment plan, making only a small initial payment therefor. (Cause No. 5662, R. 13–14; Cause No. 5663, R. 22–23.)

In 1917 Rucker Brothers purchased a large tract of timber for $625,000, paying only $5,000 in cash, and giving promissory notes for the balance. These notes were signed by W. J. and B. J. Rucker for (and in the name of) the partnership. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

During the period 1907 to 1916, the firm of Rucker Brothers borrowed several sums of money for use in the partnership. (Cause No. 5662, R. 14; Cause No. 5663, R. 23.)

All of Rucker's property at the time of his marriage having been his equity in the partnership, and this being his separate property, there being no evidence of any community property nor of separate property belonging to Mrs. Rucker, during the years 1918 and 1919, it must be concluded that the money borrowed by the firm was borrowed

on separate credit. Profits resulting from money borrowed on separate credit constitutes separate property. *Finn* v. *Finn,* 179 Pac. 103 (106 Wash. 137); *Jacobs* v. *Hoitt,* 205 Pac. 414 (119 Wash. 283); See also *United States Fidelity & Guaranty Co.* v. *Lee,* 107 Pac. 870 (58 Wash. 16).

The distributive share of Rucker in the partnership profits resulted, certainly for the most part, from the separate property. This is evidenced by the fact that Rucker received the very substantial salary of $9,000, which it is reasonable to assume, and the Board so assumed, was the value placed by the partnership upon Rucker's services on behalf of the community.

Where business income is produced in part by separate property and in part by the funds or efforts of the community, and each of these two factors is substantial, the court will attempt to allocate such earnings, but if it appears that income is to be attributed primarily to one element, the other element may be disregarded. *In re Buchanan's Estate,* 154 Pac. 129 (89 Wash. 172); *Jacobs* v. *Hoitt, supra.*

This rule is the proper one to apply for income tax purposes. *Appeal of Julius and Rebecca Shafer,* 2 B. T. A. 640.

The distributive share of B. J. Rucker, in the partnership profits, for the years 1918 and 1919, was the separate property of Rucker; hence was properly taxable to him.

The petitioner, at pages 7 and 8 of his brief, has correctly stated certain legal conclusions as having been firmly established by the Supreme Court of the State of Washington, and has applied them to the facts in the instant case. These conclusions, though correctly stated, in so far as they go, do not, however, go far enough to permit of their application or are in no way applicable to the facts in the instant case.

> Conclusion 2. The property acquired by husband and wife or either of them during the marriage relation on borrowed capital is community property.

The rule is the proper one in cases in which the money borrowed is for the benefit of, or will benefit, the community. It is not applicable to cases in which the money is borrowed for the sole benefit of separate property. *Main* v. *Scholl,* 54 Pac. 1125 (20 Wash. 205) ; *Graves* v. *Columbia Underwriters,* 160 Pac. 436 (93 Wash. 196).

> Conclusion 3. That separate property of either husband or wife so mixed or intermingled with the community as to be incapable of accurate segregation becomes community property.

This is the correct rule, where there is a commingling of separate and community property. In the instant case, there is no such commingling of property. Rucker's only property, at the time of his marriage, was his equity in the partnership.

The income under consideration was a distribution of the profits of that partnership. Nowhere does it appear that any community property was in any way intermingled. The fact that Rucker has kept no record of his separate property prior to the marriage and the community property subsequently acquired, does not affect the case. The cases cited by petitioner deal with bank balances, which could not be divided into separate and community property, or with situations in which it was clearly impossible to trace the property. We have here no such difficulty. The only property involved was at all times separate property and the "rents, issues, and profits" of separate property constitute separate property.

> Conclusion 4. That the rents, issues and profits of community property and the earnings of the husband, and of the wife while living with the husband, is community property and of course community income.

This conclusion assumes that the property was community property to start with, whereas it has been shown in the instant case that the property was separate property. It is therefore inapplicable to this case.

CONCLUSION

The distributive share of B. J. Rucker, of the partnership profits of Rucker Brothers, for the years 1918 and 1919, was Rucker's separate property and hence is taxable to him. Wherefore, it is

respectfully submitted that the decision of the United States Board of Tax Appeals should be affirmed.

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The above brief was prepared by the Bureau of Internal Revenue, and states its position. This view is not concurred in by the Department of Justice. Error is not confessed as there is decided difference of opinion as to the correct conclusion, and also because the Bureau of Internal Revenue believes the case to be of sufficient importance to warrant establishing a precedent by which the Board of Tax Appeals may guide itself.

It is believed by this Department that the following more nearly represents a correct application of the law to the facts:

The decision of the Board of Tax Appeals and the preceding argument have largely rested upon the rules laid down by the Supreme Court of the State of Washington in the case of *In re Brown's Estate,* 124 Wash. 273 (214 Pac. 10) as defining the law of the State of Washington in regard to community or separate property.

It is suggested as a primary proposition that these rules can not be construed separately or

strictly. Particularly are they modified by the sense in which they are used in the case setting them forth.

The facts in the *Brown case* are that at the time of decedent's marriage (1902) he owned property valued at $70,000. Upon the sale of this property he acquired stock in the Semper-Klale Investment Company and in the Case Shingle Company. He sold the stock in these last two mentioned companies and with the proceeds bought stock in the Le Bamm Mill Company. At his death his estate consisted of (1) real estate, (2) bank certificates, (3) cash, (4) life insurance, (5) liberty bonds, and (6) a note acquired after coverture and six other items of stock, open accounts and notes arising out of the Semper-Klale Investment Company or Le Bamm Mill Company. The wife claimed the entire estate to be community property and the executors claimed it to be separate property. The court, after laying down the rule hereinafter adverted to, says (124 Wash. 273, 277):

> In relation to items 1, 2, 3, 5, and 6, the testimony shows that all this property was acquired during coverture, and *there is an absence of proof concerning its origin or the source of the money with which it was procured.* The presumption therefore attaches that it is community property, * * *. (Italics supplied.) In regard to item 4, being the proceeds of a life insurance policy, payable to the estate, no proof was introduced and the presumption must be conclu-

> sive that it is community property. As was said in *Succession of Buddig,* 108 La. 406, 32 South. 361:
>
> "* * * He has no right to transact so as to build up a separate estate to the disadvantage of the community. As to him, primarily all the property belongs to the community * * *."

The court, *finding the other assets to be directly traceable to the original separate property of the husband,* held them to be still his separate property.

It is submitted that in the instant case there is no item of property as to which there is more positive identification than the items numbered 1 to 6 which were determined to be community property in the *Brown case, supra.* The Board of Tax Appeals says (Opinion, R. 28):[2]

> * * * The fact that the partnership interest was separate property, "the presumption continues that it is separate until overcome by evidence" and it "continues to be separate through all its changes and transitions, so long as it can be clearly traced and identified." There is no doubt that the property in question can be clearly traced and identified.

This conclusion seems to take considerable for granted. It is believed that a reference to the facts will make this clear. At the time of petitioner's marriage, it is shown that the partnership

[2] The records in cases 5662 and 5663 are practically identical and the references in this part of the brief will be only to Case No. 5663.

owned only two kinds of property: (a) certain real estate. This property is still owned and from it the partnership has received no income. (R. 22.) Thus it may be disregarded for the present purposes. (b) "Some shares of stock in the Rucker Bank." (R. 22.) The number or original or present value of these shares is nowhere shown. Nor is it shown whether these shares are still in the hands of petitioner or that they have ever yielded any income. As this is the only other property belonging to the partnership or to petitioner individually at the time of his marriage, it is apparent that from it must come the property which he now asserts to be community property in order to sustain the position urged by the Bureau of Internal Revenue.

An application of the rules laid down in the *Brown case* and relied upon by the Board of Tax Appeals will demonstrate the impossibility of tracing these shares of stock to the present property of petitioner.

> Rule 1. The presumption is that property acquired during coverture is community property * * *; and the burden is upon the person claiming it to be separate property to establish that as its character.

At the outset it may be noted and emphasized that all of these rules refer to specific property. The record shows that in 1907 or 1908 the partnership engaged in the logging and saw-mill business. From this business all its profits have been made. (R. 22–23.) Applying this rule to these facts, it

would seem clear that the property purchased by the partnership is presumed to be community property, and that the burden must rest on the respondent to show it to have been separate property. The record is silent as to any connection between any of this property acquired by the partnership in the pursuance of its timber business and the shares of stock of the Rucker Bank. Not only is this true but the record shows that the custom of the business was to buy "timber on the installment plan, making only a small initial payment therefor." (R. 23.) See *Plath* v. *Mullins,* 87 Wash. 403 (151 Pac. 811); *In re Slocum's Estate,* 83 Wash. 158 (145 Pac. 204); *Patterson* v. *Bowes,* 78 Wash. 476 (139 Pac. 225). See also discussion under Rule 4, hereafter.

> Rule 2. The status of property is to be determined as of the date of its acquisition. * * *. This rule is equally true with regard to personal property as with real property.

The record shows that the partnership did not engage in the timber and saw-mill business until 1907 or 1908, three or four years after the marriage of petitioner, and that its profits were earned through these businesses. (R. 22–23.) It is also shown that none of the property which is here in question was owned at the time of petitioner's marriage. Consequently, under Rule 2, read in conjunction with Rule 1, it must be that the instant property is community rather than separate.

> Rule 3. If property is once shown to have been separate property, the presumption

> continues that it is separate until overcome by evidence. * * *.
>
> Separate property continues to be separate through all its changes and transitions, so long as it can be clearly traced and identified.

It is freely conceded by all that the shares of stock of the Rucker Bank did, and if still held do, constitute the separate property of petitioner. The record is absolutely silent, though, as to whether or not this property is still held. Beyond this, however, the property here involved has never been shown to have been separate property, nor that it proceeded from separate property. We have only the possible supposition, which is decidedly nebulous, that the original bank stock may have grown until from it flowed all of the property here in question. This supposition is certainly not the clear, certain, and convincing evidence required by the decided cases. *In re Slocum's Estate, supra.* Neither is there in the instant case any attempt made, the Board of Tax Appeals to the contrary notwithstanding, to trace or identify the progress of this bank stock to the property here involved.

> Rule 4. The rents, issues, and profits of separate property remain separate property and profits resulting from money borrowed on separate credit are separate property.

It would seem that this can have little application to the instant case, in that the only separate property shown by this record is not shown to have yielded at any time either rents, issues, or profits.

As to the second part of the rule that "profits resulting from money borrowed on separate credit are separate property," there would seem to be little more appropriateness. The record shows that the partnership bought much timber after petitioner's marriage; that this timber was largely bought on credit. The record does not show that it was bought on the separate credit of the partners, and the presumption is that money borrowed during the existence of the community constitutes a community debt and the yield of such borrowing, community credit. *Lumbermen's National Bank* v. *Gross,* 37 Wash. 18 (79 Pac. 470); *McDonough* v. *Craig,* 10 Wash. 239 (38 Pac. 1034); *Yesler* v. *Hochstettler,* 4 Wash. 349 (30 Pac. 398).

There would seem to be nothing to sustain the contention that partnership property acquired after coverture is to be regarded as separate property of the partners.

It is suggested that the fact of partnership is immaterial in determining the status of properties. *Lumbermen's National Bank* v. *Gross, supra.*

> Rule 5. Separate property may lose its identity as such by being consolidated with community property.

While there is no separate property shown to be involved in the instant case, it is submitted that even though there was such property, it has been so mixed with that acquired by the partnership after marriage of petitioner that under this rule the

separate property, if any there may be, will have now completely lost its identity.

It has been urged on behalf of the Bureau of Internal Revenue that as petitioner received a salary from the partnership, that this salary represents his community worth to the partnership, and that any other profit derived by him through the partnership should be deemed to proceed from his original separate property. It is suggested that this view finds little support in the decided Washington cases. In *Protzman* v. *Billings,* 120 Wash. 123 (206 Pac. 848), it was held that the note of a husband constituted a community debt where it was given for the purchase of shares of stock in a corporation conducted on behalf of the community and from which the husband received a salary. See also *Denis* v. *Metzenbaum,* 124 Wash. 86 (213 Pac. 453).

The brief for the Bureau of Internal Revenue has cited a great many cases. As these cases are not contrary to the spirit of those here cited, a separate consideration is not deemed necessary. Differences arise solely as to the application.

Respectfully submitted.

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MARCH, 1929.

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